

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BILLIE LOU CRADDOCK
Claimant

VS.

DILLONS

Respondent

AND

TRANSPORTATION INSURANCE COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 168,099

ORDER

ON the 17th day of March, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey dated February 7, 1994, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through her attorney, Robert R. Lee of Wichita, Kansas. The respondent and insurance carrier appeared by and through their attorney, Clifford K. Stubbs of Lenexa, Kansas. The Fund appeared not, having been dismissed by earlier agreement of the parties. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of Administrative Law Judge

are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's injury and disability?
- (2) Is claimant entitled to unauthorized medical expense?
- (3) What is claimant's average weekly wage?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant has suffered a twelve and one-half percent (12.5%) loss of use of the right lower extremity as a result of the injury occurring on May 23, 1991.

Claimant, a 62-year old woman with a 10-year work history at Dillons, slipped and fell on May 23, 1991, injuring her right foot and leg. She was provided medical care through Dr. Armstrong whose medical records were not placed into evidence. Subsequently claimant, at her own request, was referred to Paul W. Toma, D.O., a board certified orthopedic surgeon, who examined claimant on two occasions. Dr. Toma, who was provided with Dr. Armstrong's records, examined claimant for complaints to both feet, ankles, and knees. He was unable to explain all of claimant's complaints as there were subjective complaints from the claimant, not supported by his findings. His examination found no atrophy in the claimant's calf, and no ankle swelling indicating claimant was using the leg. He did find a slight decrease in the range of motion of the right ankle which, per the American Medical Association's Guides to the Evaluation of Permanent Impairment, resulted in a four to five percent permanent partial impairment to the right lower extremity on a functional basis. This rating was provided after the doctor had the opportunity to examine bone scans and MRI's of the claimant's bilateral knees and ankles. The only abnormal finding on the bone scan was a slight increase in activity in the right ankle. The normal MRI indicated no vascular necrosis which was a main concern.

The doctor noted at his last examination that the claimant walked without a limp and opined no future surgery would be of benefit to this claimant. The question regarding a potential arthrodesis was raised and the doctor testified that this type of surgery would not bode well with the claimant as the limitation of motion caused by this surgery would increase her problems.

His examination also indicated claimant was knock-kneed creating a patella problem which would not be significantly aggravated by standing but would be very much aggravated by significant or regular stair climbing. While he found mild crepitus in the knees, this finding was not related to her fall at Dillons but to the knock-knee patella problem.

Claimant was later examined at her attorney's request by Dr. Ernest R. Schlachter, a general practice physician, who found swelling in the right ankle which stemmed from the callous formation over the fracture site. He limited claimant to no running, no walking long distances, no climbing stairs or ladders, and no working on rough ground. He further opined that she should do only limited kneeling and squatting, and rated her at twenty percent (20%) permanent partial impairment to the right lower extremity on a functional basis pursuant to the American Medical Association's Guides to the Evaluation of Permanent Impairment. He did predict the need for a future arthrodesis.

Dr. Schlachter did not have in his history information regarding the problems suffered by claimant in 1990 when she was diagnosed as having bone spurs in both heels for which she underwent surgery. Nevertheless, he was of the opinion that there was no connection between the bone spurs and the trauma suffered at Dillons on the date of injury.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all the various conditions on which her right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 786, 817 P.2d 212 (1991). The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making his own determination. Id. at 785.

The medical testimony in this case is somewhat conflicting. The claimant testified

that Dr. Armstrong found no permanency to her right lower extremity. While the medical records of Dr. Armstrong were never placed into evidence this testimony of the claimant was obtained without objection by counsel.

In reviewing the medical testimony the Appeals Board feels that the testimony of Dr. Schlachter appears to be somewhat less reliable in that the doctor was not provided a complete history of claimant's prior problems. In evaluating claimant and reaching his opinion regarding her permanent impairment it would appear as though certain complaints not associated with her fall may have been included. This would tend to inflate the doctor's impairment rating and render it less credible than would be appropriate for an expert in a workers compensation matter.

The Appeals Board, on the other hand, does not consider the four to five percent rating of Dr. Toma to be totally appropriate given claimant's ongoing problems and complaints. As such, the Appeals Board believes the truth lies somewhere in between and assesses a twelve and one-half percent (12.5%) permanent partial impairment of function to the claimant's right lower extremity.

(2) K.S.A. 44-510 allows an employee, who is not satisfied with the health care being provided to consult a health care provider of the employee's choice for the purpose of examination, diagnoses or treatment. The limitations set forth in this statute allow the employer to be liable for only up to \$350.00 in unauthorized medical. The evidence indicates Dr. Schlachter's examination of the claimant was unauthorized and as such the claimant would qualify for unauthorized medical of up to \$350.00 upon proper presentation of an itemized statement.

(3) The weight of the credible evidence is that claimant was a permanent employee working on a contract-basis which required claimant to work less than full-time. Claimant commonly worked 20 to 30 hours per week with the most hours worked by the claimant to be 32.7 hours in the 26 weeks preceding the accident. As such, the Appeals Board finds the average weekly wage of \$271.80 per week to be supported by the weight of the credible evidence.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated February 7, 1994, shall be affirmed in part and reverse in part and that claimant shall be granted an award against Dillons, Inc. and Transportation Insurance Company.

The claimant is entitled to 20.57 weeks temporary total disability compensation at the rate of \$181.21 per week in the sum of \$3,727.49 followed by 21.18 weeks of compensation at the rate of \$181.21 per week in the sum of \$3,838.03 for a twelve and one-half percent (12.5%) permanent partial impairment of the right lower extremity on a functional basis making a total award of \$7,565.52 all of which is past due and owing and ordered paid in one lump sum minus any compensation previously paid.

Claimant is entitled to future medical upon proper application to and approval by the Director of Workers Compensation.

Claimant is entitled to an amount not to exceed \$350.00 in unauthorized medical expense upon presentation of an itemized statement.

Claimant's contract of employment with her attorney is herein approved so far as it is in agreement with K.S.A. 44-536.

Fees necessary the expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid as follows:

WILLIAM F. MORRISSEY Special Administrative Law Judge	\$ 150.00
MARTIN D. DELMONT, CSR Transcript of Regular Hearing	\$ 75.10
TODD REPORTING Transcript of Regular Hearing (cont'd)	\$ 168.10
PATRICIA K. SMITH Deposition of Paul Toma, D.O.	\$ 111.00
BARBER & ASSOCIATES Deposition of Ernest R. Schlachter, M.D.	Unknown

IT IS SO ORDERED.

Dated this _____ day of April, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Robert R. Lee, 1861 N. Rock Road, Suite 320, Wichita, Kansas 67206
Clifford K. Stubbs, P.O. Box 14548, Lenexa, Kansas 66285
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director